No. 92-664

Supreme Court, U.S.
FILED
NOV 12 1992
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

RONALD H. RILEY,

Petitioner,

—v.—

KINGSLEY UNDERWRITING AGENCIES, LTD., A BRITISH CORPORATION, LIME STREET UNDERWRITING AGENCIES, LTD., A BRITISH CORPORATION, BANKSIDE SYNDICATE LIMITED, A BRITISH CORPORATION, FIRSTBANK OF VAIL, N.A., ROBIN C. KINGSLEY, ROBERT HALLAM, SOCIETY AND COUNCIL OF LLOYD'S, AND JOHN DOES I THROUGH X,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER QUESTIONS PRESENTED

1. Whether this Court's unbroken line of precedents favoring enforcement of choice of forum and choice of law clauses in international agreements warranted dismissal by the courts below of Petitioner's federal and state securities law and common law fraud claims against the Society and Council of Lloyd's of London and against Petitioner's Members' Agents at Lloyd's of London, arising out of Petitioner's membership in that English institution.

2. Whether the United Nations Convention on the Recognition and Enforcement of Arbitral Awards, to which both the United States and the United Kingdom are parties, and the emphatic federal policy favoring arbitration, require enforcement of Petitioner's commitment to arbitrate his disputes with his English Members' Agent at Lloyd's of London.

STATEMENT PURSUANT TO RULE 29.1

Respondents Kingsley Underwriting Agencies, Ltd., a British corporation, Lime Street Underwriting Agencies, Ltd., a British corporation, Bankside Syndicate, Ltd., a British corporation, and the Society and Council of Lloyd's, have no parent or subsidiary corporations within the meaning of Rule 29.1 of the Rules of the Supreme Court of the United States.

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COUNTERSTATEMENT OF THE FACTS

Respondent incorporates by reference the statement of facts in the opinion below (A-3-7).[1] The record also demonstrates the international character of Mr. Riley's becoming an underwriter at Lloyd's: he first met his Members' Agent in London; subsequently travelled to London for a formal interview with a member of the Lloyd's Council, or governing body, who inquired whether he understood that as a member he would be liable to the full extent of his net worth to pay claims on the insurance policies which his syndicates would underwrite.[2]

The alleged misrepresentations that led Petitioner to join Lloyd's in 1980 occurred between 1978 and 1980 (Complaint ¶¶ 39-57; Transcript of District Court proceedings, Aug. 20, 1991, at 11, 16 (pages 36 and 41 of Mr. Riley's Appendix filed with the Tenth Circuit)). His alleged "investment" in the unique market at Lloyd's was the purchase of a letter of credit, which varied in amounts from £150,000 to £350,000 over his eleven years of membership.

Petitioner errs in suggesting that the decision below deprives him of a right available to him under U.S. securities laws. When the Securities and Exchange Commission (the "SEC") in 1987 and 1988 reviewed the whole issue of offering membership in Lloyd's to United States persons, it concluded that if the Members' Agents solicited participation in Lloyd's in compliance with the procedures of the Commission's Regulation D, registration under the Securities Act was *not* required. To the SEC the security was the U.S. person's relationship with his

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1 Denotes reference to Appendix A to the Petition for Certiorari.

2 Before joining Lloyd's in 1979 he was given "An Introduction to Lloyd's Underwriting Membership" which stated, among other things, that:

> It must be stressed that Underwriting is a risk business and an Underwriting Member of Lloyd's has unlimited liability with regard to the share or risks accepted by each Syndicate in which he or she participates.

See Ex. 1 to the Supplemental Appendix, submitted by respondents to the Tenth Circuit.

Members' Agent, with the issuer being the particular Members' Agent involved. The SEC's position was reaffirmed in 1991. *See* letter of Aug. 5, 1991 from the Senior Associate Director of the SEC, which the respondents herein submitted to the Tenth Circuit as Ex. D to their brief in opposition to Mr. Riley's motion for injunction pending appeal, and which is attached hereto as pages RA-1-4.[3]

REASONS FOR DENYING THE PETITION

I.

There Is No Conflict Among Courts Of Appeal.

Federal District Courts sitting in Chicago and in New York have both recently decided cases brought by other U.S. members of Lloyd's in favor of Lloyd's and their Members' and Managing Agents on facts virtually identical to those in this case. *Bonny v. Society of Lloyd's*, 784 F. Supp. 1350 (N.D. Ill. 1992) (denying request for preliminary injunction), No. 91 C 5525, slip op. (N.D. Ill. May 29, 1992) (dismissing case) (the May 29 Order is attached hereto as Appendix B); *Roby v. Corporation of Lloyd's*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,971 (S.D.N.Y. Aug. 18, 1992). Consistent with this Court's teaching, each of those courts has dismissed the complaints before them, finding that the pre-dispute international agreements containing choice of forum and choice of law clauses ("Choice Clauses") as to Lloyd's, and the Arbitration Clause as to the Agents, were valid and enforceable. Those decisions are now on appeal to the Seventh and Second Circuits, respectively. The Seventh Circuit will hear oral argument in *Bonny* in December 1992; the Second Circuit will hear oral argument in *Roby* in January, 1993. The only disharmony with these decisions, and with this Court's precedents, is a single recommended decision of a Federal District Court magistrate judge in Houston, which antedated the complete analyses in *Roby*, *Bonny*, and the Tenth Circuit below. The Texas magis-

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3 "RA-____" denotes references to Respondents' Appendix.

trate judge recommended that a similar complaint not be dismissed (see Exhibit C to Petition); a district court judge has accepted that recommendation (see Exhibit D to Petition) but rehearing of that order has been sought and no decision on rehearing has yet been rendered. That district court decision conflicts with a contrary decision by its circuit court, which dismissed a similar Name's action against Lloyd's, prior to the time when Choice Clauses were included in membership contracts, on grounds of *forum non conveniens*.[4] *See Hirsch v. Oakeley Vaughan Underwriting, Ltd. and the Society, Council, and Corporation of Lloyd's*, No. 89-2563, unpublished slip opinion[5] (5th Cir. May 31, 1989), *cert. denied*, ___ U.S. ___, 111 S. Ct. 511 (1990).

Less than two years ago, this Court denied a petition for *certiorari* in the *Hirsch* case, cited above, on essentially the same alleged fact pattern as in the instant case. *Id.*

In a closely analogous ruling, the Circuit Court of Appeals for the First Circuit has recently affirmed that ordinary *forum non conveniens* considerations which would warrant dismissal in favor of the courts of a foreign country apply equally to actions brought under the United States securities laws, *Howe v. Goldcorp Invs., Ltd.*, 946 F.2d 944 (1st Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1172 (1992). *A fortiori*, international contractual agreements to achieve the same result should be honored.

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4 Accord: *Roby*, Fed. Sec. L. Rep. at p. 94,171; "The overwhelmingly English nature of this dispute likely also would warrant dismissal of the action on *forum non conveniens* grounds."

5 To the Fifth Circuit, *Hirsch* raised no important new issue but was "merely decide[d] . . . on the basis of well-settled principles of law. . . ." *Hirsch*, slip op. at 1 n.1. *See* the Appendix to the *Petition for Certiorari* in *Hirsch*, No. 90-519.

II.

The Decision Below Followed This Court's Consistent Holdings That Choice Clauses In International Agreements Must Be Upheld.

The court below, as have the courts in *Roby* and *Bonny*, merely applied the clearly articulated jurisprudence of this Court to the unique facts presented by contractual participation by foreign underwriters in the Lloyd's insurance market.[6]

Petitioner conceded below that "The enforcement of forum and choice of law clauses is consistent with recent U.S. Supreme Court decisions." A-8. When petitioner elected to become an insurance underwriter, he and Lloyd's agreed with one another that their respective rights and obligations would be "governed by and construed in accordance with the laws of England," and that any dispute would be settled in "the courts of England."[7] Petition at 9-10. These Choice Clauses were an integral part of a bargain which petitioner enjoyed for a number of years, and now seeks to repudiate. Attempts to evade such clauses have been thoroughly considered and solidly rebuffed by this Court in *M/S The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) and, just months ago, in *Carnival Cruise Lines, Inc. v. Shute*, ____ U.S. ____, 111 S.Ct. 1522 (1991).

In *The Bremen*, a contract for towing a drilling rig from Louisiana to Italy provided for judicial resolution of disputes in an English forum. In transit, the rig suffered storm damage and was towed to Tampa, Florida. In Florida the owner, like

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6 The singular and complicated structure of Lloyd's and the complex of agreements which defined petitioner's relationship at Lloyd's are set forth in *Roby* at p. 94,164-66.

7 "Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to [Riley's] membership of, and/or underwriting of insurance business at, Lloyd's." A-4.

petitioner herein, "ignoring its contract promise to litigate 'any dispute arising' in the English courts," 407 U.S. at 3, filed suit in the United States district court. The district court denied a motion to dismiss, and the Court of Appeals affirmed, holding the forum-selection clause unenforceable on public policy grounds because the plaintiffs' claims would be subject to exculpatory clauses in England, but not in the United States where they were against public policy. This Court reversed. Pointing out the "expansion of overseas commercial activities by business enterprises based in the United States," 407 U.S. at 9, it observed:

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.

Chief Justice Burger explained the reasons guiding the Court's ruling as follows: first, as here, a number of jurisdictions could otherwise be the situs of suit, and the parties justifiably wished to avoid the uncertainty and inconvenience which could come to pass as a result. 407 U.S. at 13. Secondly, the choice-of-forum clause was a "vital part of the contract" (as the Choice Clauses certainly were here, embracing two of the three substantive paragraphs in the General Undertaking; *see* A-4-5) and the Court quoted with approval the statement of the English High Court of Justice that:

> [T]he force of an agreement for litigation in this country, freely entered into between two competent parties, seems to me to be very powerful.

407 U.S. at 14. Finally, this Court concluded with a strong endorsement of the forum-selection clause:

> Thus, in the light of present-day commercial realities and expanding international trade we conclude that the forum clause should control absent a strong showing that it should be set aside.

407 U.S. at 15.

In *Scherk*, a contract covering the sale of several German businesses and associated trademarks provided for arbitration in France as the forum with Illinois law as the applicable law. Like Petitioner, the American company sought to repudiate its contract, and filed suit in Illinois claiming violations of the Securities Exchange Act of 1934, 15 U.S.C. § 78a, *et seq*. The district court and the court of appeals held the choice clauses, in particular the arbitration clause, to be unenforceable. This Court again reversed, as it had in *The Bremen*. Speaking through Mr. Justice Stewart, this Court discussed its rationale for honoring choice clauses in international transactions. It emphasized the advantages to those engaged in international commerce in eliminating uncertainties in the applicable law, stating:

> Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.

417 U.S. at 516.

This Court rejected the post-contract forum shopping so vividly illustrated by the instant case:

> A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages.

417 U.S. at 516-7. It reaffirmed the rationale and reasoning of *The Bremen*, 417 U.S. at 518.

This Court next decided *Mitsubishi*, a case that Judge Carrigan in the district court below saw as "squarely contrary" to petitioner's position. Transcript of district court proceedings,

Aug. 30, 1991, at 9 (page 186 of Mr. Riley's Tenth Circuit Appendix). *Mitsubishi* held that an agreement requiring arbitration in Japan is valid and enforceable and extends to statutory claims under the U.S. antitrust laws. In its analysis, this Court repeated, once more and in detail, the principles applicable to commercial transactions in international commerce, emphasizing the need for certainty and predictability in international dealings:

> [W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context. . . .
>
> Notwithstanding the possibility that the English court would enforce provisions in the towage contract exculpating the German party which an American court would refuse to enforce, this Court [in *The Bremen*] gave effect to the choice-of-forum clause.

473 U.S. at 629. The Court condemned reliance upon purely domestic policies as a ground for striking down a choice clause and summarized the law in these terms:

> *The Bremen* and *Scherk* establish a strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions. Here, as in *Scherk*, that presumption is reinforced by the emphatic federal policy in favor of arbitral dispute resolution. And at least since this Nation's accession in 1970 to the Convention, see [1970] 21 U.S.T. 2517, T.I.A.S. 6997, and the implementation of the Convention in the same year by amendment of the Federal Arbitration Act, that federal policy applies with special force in the field of international commerce.

473 U.S. at 631. *Accord, Carnival Cruise Lines, supra*; *Development Bank of Philippines v. Chemtex Fibres, Inc.*, 617 F. Supp. 55, 57 n.12 (S.D.N.Y. 1985) (concluding from

Mitsubishi that "it is clear that the Convention does not contemplate the expression of local public policy as a barrier to the arbitrability of claims"); McLaughlin & Genevro, *Enforcement of Arbitral Awards Under the New York Convention—Practice in U.S. Courts*, 3 Int'l Tax & Bus. Law. 249, 260 n.69 (1986).

Under the principles articulated by this Court in *Mitsubishi*, the public policy doctrines launched by petitioner are ripe for application, if ever, only at the enforcement stage of arbitral or litigation proceedings. Footnote 19 disposed of the very argument which petitioner now makes in this Court, (based on his extrapolation of footnote 21 in the same opinion), namely that the court should refuse to enforce his Choice Clauses because holding them valid would result in a waiver of remedies under American law. Footnote 19 explained that an *amicus* brief had raised the issue that, because the agreement provided that the laws of Switzerland would govern, Swiss law rather than American antitrust law would be the law of decision. Noting that the arbitration panel had taken the antitrust claims under submission, the Court disposed of this argument by saying:

> We therefore have no occasion to speculate on this matter at this stage in the proceedings, when Mitsubishi seeks to enforce the agreement to arbitrate, not to enforce an award. Nor need we consider now the effect of an arbitral tribunal's failure to take cognizance of the statutory cause of action on the claimant's capacity to reinitiate suit in federal court.

473 U.S. at 637 n.19.

A similar result was reached in the context of a federal securities act case in *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213 (1985). In *Byrd*, this Court declined to override an arbitration clause based on the possible future preclusive effects on federal claims of a state arbitration proceeding, on the grounds that:

> The question of what preclusive effect, if any, the arbitration proceedings might have is not yet before us, however, and we do not decide it. The collateral-estoppel

> effect of an arbitration proceeding is at issue only after arbitration is completed, of course, and we therefore have no need to consider now whether the analysis in *McDonald* encompasses this case. Suffice it to say that in framing preclusion rules in this context, courts shall take into account the federal interests warranting protection. As a result, *there is no reason to require that district courts decline to compel arbitration, or manipulate the ordering of the resulting bifurcated proceedings, simply to avoid an infringement of federal interests.*

470 U.S. at 223 (emphasis added).

This principle applies to this case. Even though it is impossible to predict whether arbitration or litigation, in England under English laws, would ultimately infringe to an unacceptable degree upon Riley's claimed federal rights, the *Roby* court noted how unlikely was that prospect, *Roby supra* at p. 94,171:

> Although English law does not afford the treble damage provisions of RICO or the less rigorous elements of proof of the American securities laws, it does at a minimum offer a full panoply of common law remedies for the alleged behavior underlying all plaintiffs' claims. These remedies include equitable claims for rescission of fraudulently induced agreements and damages claims for negligent or fraudulent misrepresentation, or "deceit." Plaintiffs have conceded that these remedies are available as to the Managing and Members' Agents, who more directly interacted with plaintiffs than did other defendants, and, upon a stronger showing of scienter, as to Lloyd's. In addition, English securities regulations may be enforced against Lloyd's upon application by the government on behalf of a defrauded or misled purchaser of securities. Such remedies afford plaintiffs protection under the law; the English law which they earlier accepted merely is less advantageous than the American law that they now prefer. Under the circumstances, plaintiffs are not entitled to more.

The Tenth Circuit, whose review is sought here agreed:

> "Riley will not be deprived of his day in court. He may, though, have to structure his case differently than if proceeding in federal district court." A-11.

In dismissing securities claims brought by an American investor in favor of a Canadian forum, despite plaintiff's objections that such a dismissal was not proper unless it was first clear that the Canadian courts would apply U.S. securities laws, the Court of Appeals for the First Circuit stated:

> Trial in Canada will not deprive the plaintiff of relevant legal advantages. Canadian courts will either apply American law . . . ; or they will apply Canadian laws that offer shareholders somewhat similar protections by forbidding misrepresentation and fraud and imposing fiduciary obligations.

Howe v. Goldcorp Invs., Ltd., 946 F.2d 944, 952 (1st Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S. Ct. 1172 (1992) (citations omitted).

In the final analysis, *Mitsubishi* establishes two important and far reaching principles, which stand as beacons for the decision in the instant case. First, those who choose to engage in business on an international scale should expect that United States courts will enforce their contracts designating a particular forum for the resolution of disputes. Second, any attack which they believe they can make in our courts will be considered, if at all, only at the award enforcement stage, not when their choice clauses alone are at issue. On their face, the Choice Clauses in petitioner's agreements, utilized by underwriters from more than fifty countries, show that they were not based on any ulterior motive to evade any United States laws. They are of the type described by this Court as "indispensable" in foreign commerce, and as such, are favored with strong presumptions of enforceability, and applied "with special force in the field of international commerce." *Mitsubishi*, 473 U.S. at 631. Far from constituting a *sub rosa* "waiver," they support important public policy through a suite of beneficial effects,

including furtherance of international commerce, prompt and efficient resolution of disputes, predictability in choice of law, and recognition of private agreements freely entered into among the world's citizens. In denying the petition, this Court would be following its own strong line of precedents.

III.

The Convention On The Recognition And Enforcement Of Foreign Arbitral Awards Requires Enforcement Of The Arbitration Clause Of The Contract.

Decisions at every level of U.S. courts support the decisions below requiring enforcement of petitioner's agreements to arbitrate. This Court, in *Mitsubishi*, specifically considered whether enforcement of arbitration under the Convention was selective, that is, whether enforcement would be ordered with respect to some subjects but not to others, and squarely rejected petitioner's theory (*see* Petition at 18) that the non-waiver sections of the securities laws should, notwithstanding the Convention, be construed to release him from compliance with his contract to arbitrate. Again pointing to the need for mutual acceptance in the family of nations, 473 U.S. at 638, this Court concluded that it should not read exceptions into the Convention. Congress had intended the Convention to be all-inclusive:

> [I]n implementing the Convention by amendment to the Federal Arbitration Act, Congress did not specify any matters it intended to exclude from its scope.
>
> * * *
>
> [W]e decline to subvert the spirit of the United States' accession to the Convention by recognizing subject-matter exceptions where Congress has not expressly directed the courts to do so.

473 U.S. at 639 n.21.

Under the leadership of this Court, court after court has enforced arbitration agreements under the Convention, following this Court's lead in the *Scherk* securities case. *David L. Threlkeld & Co. v. Metallgesellschaft Ltd. (London)*, 923 F.2d 245, 248 (2d Cir.), *cert. dismissed*, ____ U.S. ____, 115 L. Ed. 2d 104 (1991) (Convention "makes it clear that the liberal federal arbitration policy 'applies with special force in the field of international commerce' ");[8] *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186-87 (1st Cir. 1982) (when a district court finds, after "a very limited inquiry" that the requirements of the Convention are fulfilled, "then it *must* order arbitration unless it finds the agreement 'null and void, inoperative or incapable of being performed' ") (emphasis in original); *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032, 1037 (3d Cir. 1974) ("There is nothing discretionary about article II(3) of the Convention. It states that district courts *shall* at the request of a party to an arbitration agreement refer the parties to arbitration") (emphasis in original); *Gates Energy Prods. v. Uyasa Battery Co.*, 599 F. Supp. 368, 371 (D. Colo. 1971) (directing arbitration in Japan under the Convention).

Since the beginning of this calendar year a number of cases involving the enforceability of arbitration clauses under the Convention have been decided and, consistently with the Lloyd's decisions, every one has compelled the arbitration of claims. *See Siderman de Blake v. Republic of Argentina*, 965

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8 London stands at the very top of the list as a locale for resolution of international disputes through arbitration:

> Due to its historic position in international trade and the repute of its legal system, [England] has for long been a world centre for the settlement of international commercial disputes. Our arbitration law was fully developed by the middle of the last century, and owing to the world-wide use of English standard forms of contract in many fields, most of which provide for arbitration here, it is probably still the most important single arbitration centre in the world, in the same way as the Commercial Court is almost certainly the most widely used single court for international commercial litigation.

Kerr, *International Arbitration v. Litigation*, 1980 J. Bus. Law 164, 178 (1980).

F.2d 699 (9th Cir. 1992); *Ministry of Defense of the Islamic Republic v. Gould, Inc.*, 969 F.2d 764 (9th Cir. 1992); *McDermott Int'l, Inc. v. Underwriters at Lloyd's*, 947 F.2d 1489 (E.D. La. 1992); *Interamerican Trade Corp. v. Companhia Fabricadora de Pecas*, 973 F.2d 487 (6th Cir. 1992); *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753 (7th Cir. 1992); *Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229 (S.D.N.Y. 1992).

Underlying this Court's decisions is the recognition that, in order for the Convention to be effective, the courts of many lands must work in concert to enforce it at every step of the way. Each nation must surrender its individual particularized interests in order that its citizens may be the beneficiaries of the advantages of international arbitration as a facilitator of commerce. In the early days of the Convention, concerns were expressed that the "public policy" exception in Article V(2)(b) would, given its vagueness and the multiplicity of interests which could fall into its ambit, become a loophole which would prevent the Convention from being effective. Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 Sw. U.L. Rev. 1, 13 (1971). However, after more than thirty years of experience internationally, and more than twenty years of United States' commitment, these fears have not been realized. The courts of the signatory nations, including the United States, have honored the need for reciprocity among nations, and have been vigilant in guarding against creating exceptions to enforcement which would overwhelm the philosophy of mutual enforcement so necessary to make the Convention a living commercial force. Martinez, *Recognition and Enforcement of International Arbitral Awards Under the United Nations Convention of 1958: The "Refusal Provisions"*, 24 Int'l Law. 487, 508-09, 516 (1990); Richard, *Enforcement of Foreign Arbitral Awards Under the United States Convention of 1958: A Survey of Recent Federal Case Law*, 11 Md. J. Int'l L. & Trade 13, 15, 42-44 (1987).

Accordingly, this Court should deny petitioner's request (Petition at 13-17) to review whether *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) and *Rodriguez de Ouijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), should be read to preclude arbitration where arbitration might deny "substantive" rights.

The *McMahon* court brought both RICO and Rule 10(b)-5 claims within the arbitration clause between the parties, relying on the strong policies favoring arbitration articulated in *Scherk* and other cases, and holding that the arbitration forum was adequate to protect substantive rights. The court specifically rejected the argument that enforcement would effect a waiver of rights under section 29(a) of the Securities Exchange Act of 1934.

In *Rodriguez*, two years later, this Court drove the final nail in the coffin of the argument that arbitration was unsuitable for the resolution of securities claims in general, and claims under the Securities Act of 1933 in particular. Overruling any remaining part of *Wilko v. Swan*, 346 U.S. 427 (1953), and drawing upon its recent long line of decisions giving ever-increasing viability to the arbitral process, the Court refused to strike down arbitration on the theory of voidness under section 14 of the Securities Act of 1933.[9]

Moreover, upholding domestic arbitration as they did, neither decision put upon the scales the even stronger policies favoring arbitration in the international field. *See Scherk*, 417 U.S. at 515, where this Court held that an international contract "involves considerations and policies significantly different from those controlling in [the domestic arbitration case of]

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9 After *Rodriguez*, this Court has continued to eliminate barriers to domestic arbitration in *Gilmer v. Interstate/Johnson Lane Corp.*, ___ U.S. ___, 111 St. Ct. 1647 (1991) and *Dean Witter Reynolds, Inc. v. Alford*, ___ U.S. ___, 111 S. Ct. 2050 (1991), which held for the first time that claims for age discrimination and sex discrimination, respectively, are arbitrable. Congress continued to eliminate such barriers by the enactment of 35 U.S.C. § 294, providing for the submission of patent claims to arbitration.

Wilko." Nor did this Court consider the Congressional intent to further arbitration as manifested in the Convention or the 1970 amendment to the Federal Arbitration Act—which made no exception for securities claims even though Congress was obviously aware of them and their importance relative to other claims which would become subject to arbitration in foreign lands. When these factors are added to the *McMahon* and *Rodriguez* endorsement of domestic arbitration as a forum for resolving securities act claims, it becomes apparent that the international agreement in this case should be enforced. *See Mitsubishi*, holding that international arbitration agreements would be enforceable "even assuming that a contrary result would be forthcoming in a domestic context." 473 U.S. at 629.

The petitioner herein asks this Court to overturn not only its own strong precedents, but every tenet of modern jurisprudence considering the Convention; to demonstrate the unwillingness of the United States to act in furtherance of a global necessity and then to invite the courts of all other nations to do the same. Petitioner would deprive the business interests of this country of the many advantages of a smooth-working and reciprocal mechanism of international dispute resolution which the Congress intended to create when the Convention was implemented. He asks this Court to return to costly, virtually unworkable, and oft-criticized litigation as the only means of vindicating rights in international trade.

CONCLUSION

The petition for *certiorari* should be denied.

Respectfully submitted,

TAYLOR R. BRIGGS
Counsel of Record
SHEILA H. MARSHALL
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On The Brief

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APPENDIX A

[Seal] UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE
EXECUTIVE DIRECTOR

Stop 2-6

October 11, 1991

Taylor R. Briggs, Esq.
LeBoeuf, Lamb, Leiby & MacRae
520 Madison Avenue
New York, New York 10022

Re: FOIA #91-1351

Dear Mr. Briggs:

This is in response to your letter dated October 3, 1991, and received in this Office on October 4, 1991, in which you request access to a letter from Ms. Mary E.T. Beach to Don J. Pease concerning Lloyd's of London's solicitation of American citizens to become participants in Lloyds, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. 552

We have identified the responsive letter and made a determination to grant access. A copy of the letter is enclosed

If you have any questions, please contact Arleta D. Cunningham of my staff at (202) 272-3651

Sincerely,

[Hannah R. Hall]

Hannah R. Hall
FOIA/Privacy Act Branch Chief

Enclosure

[Seal]

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

August 5, 1991

CHAIRMAN'S OFFICE
MAILED
AUG 5 1991

The Honorable Don J. Pease
United States House of
Representatives
2410 Rayburn Building
Washington, D.C. 20515

Signed by: _____

Re: Lloyd's of London

Dear Congressman Pease:

I have been asked to respond to your letter of June 20, 1991 in which you ask certain questions pertaining to a letter you received from one of your constituents, Mr. John Steiner Roby. Mr. Roby's letter concerns the solicitation of American citizens to become participants in Lloyd's of London ("Lloyd's") by becoming Names, and the subsequent losses of those who become Names.

Before we address your specific questions perhaps it would be helpful if we briefly described the unique structure of Lloyd's, as it is not an insurance company in the manner of a typical U.S. insurance company. There are three basic components of Lloyd's. First is Lloyd's itself ("Lloyd's") which is not a company but rather an insurance marketplace at which individuals conduct separate insurance underwriting businesses. The second component is the Corporation of Lloyd's, whose sole function is to provide the premises, administrative staff and support services. The third component is the Council of Lloyd's (the "Council") which is the body charged with regulating the entire Lloyd's structure. The individuals who comprise Lloyd's, called "Members" or "Names", conduct their

underwriting business exclusively through "Members' Agents". All Members must be elected to their memberships by the Council and must be sponsored by two other members. All of a Member's underwriting business at Lloyd's is conducted pursuant to a standard Agency Agreement with the Members' Agent. The Agency Agreement grants the Members' Agent continuing authority to conduct the Members' underwriting business, including accepting risks and effecting reinsurance, collecting all premiums due the Member, and paying all liabilities and other obligations of a Member. In essence, a Member delegates complete control of his affairs to the Members' Agent and the Member may take no part in the day-to-day business. The Members' Agent exercises virtually complete control over a Members' syndicate participation. Finally, the active insurance underwriters at the end of the chain are principals or employees of "Managing Agents", which are U.K. Corporations or partnerships approved by the Council to accept insurance risks at Lloyd's. Managing Agents are either also Members' Agents or are the agents of such Members' Agents.

Your first question is whether there is any regulation of Lloyd's solicitation of participations in the United States. The staff of the Commission's Division of Corporation Finance has had discussions on two occasions with Lloyd's concerning the applicability of the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act") to the solicitation of U.S. Citizens to participate in Lloyd's. It is the Division's position that the solicitation of participations involves the sale of a security, with the issuer of that security being the particular Members' Agent involved. Accordingly, such U.S. sales would be subject to all of the provisions of the Securities Act and the Exchange Act, including the anti-fraud provisions. At the time of those prior discussions, it was determined that if the Members' Agents solicited participations in accordance with the procedures proposed by Lloyd's counsel (an offering structure intended to comply with the Commission's Regulation D), registration under the Securities Act would not be required. However, in light of the issues raised by Mr. Roby and others, the staff may consider

whether the actions of Members' Agents were consistent with the earlier representations of counsel and whether further action is appropriate.

Your second question is whether the participations in Lloyd's are analogous to partnerships and what regulations apply to those types of investments. While Lloyd's participations do more closely resemble general partnership interests than they do other securities, such as shares of common stock, they are quite unique investments. For example, they may only be held by individuals, they are not transferable, even under the laws of descent and distribution, and the liability thereunder is unlimited although no Name is liable for the "share" of other Names. There is no existing precedent as to whether Lloyd's participations are securities but, as was pointed out above, the Division of Corporation Finance believes they are securities and as such are subject to the provisions of the Federal securities laws in the same manner and to the same extent as more conventional securities.

Finally, you ask whether U.S. participants in Lloyd's properly can obtain venue in litigation against Lloyd's in the United States. Your constituent asserted that litigation against Lloyd's in the United States has been terminated as not being properly venued. We are not aware of the litigation to which your constituent refers, although it may involve a cause of action outside the Federal securities laws. However, subject to certain limitations and conditions, the provisions of the Federal securities laws generally are as applicable to the sales of foreign securities (including participations in Lloyd's) in the United States as they are to the sales of domestic securities.

I hope that the above material will be helpful in responding to your constituent's concerns. If you have any further questions, please do not hesitate to contact me.

Sincerely,

Mary E. T. Beach
Senior Associate Director

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 91 C 5525

KENNETH F. BONNY, FRANCESCA B. BONNY and ROBERT D. FLESVIG,

Plaintiffs,

—v.—

THE SOCIETY OF LLOYD'S, HARRIS BANK GLENCOE-NORTHBROOK, N.A., HARRIS TRUST AND SAVINGS BANK, BANK OF MONTREAL, NORTHFIELD VENTURE, INC., ROBERT B. KING, ALAN J. HUNKEN, LIME STREET UNDERWRITING AGENCIES LTD., ROBIN C. KINGSLEY, ROBERT C. HALLAM, PATRICK M. CORBETT, and BANKSIDE UNDERWRITING AGENCIES LTD.,

Defendants.

HONORABLE CHARLES R. NORGLE

ORDER

Before the court are the objections of plaintiffs Kenneth F. Bonny, Francesca B. Bonny and Robert D. Flesvig to Magistrate Judge Gottschall's April 20, 1992 report and recommendation that plaintiffs' amended complaint be dismissed. For reasons that follow, the report and recommendation (attached as Appendix A) is adopted and the plaintiffs' amended complaint is dismissed.

The defendants' motion to dismiss the amended complaint was referred to Magistrate Judge Gottschall pursuant to 28 U.S.C. § 636(b)(1)(B). The plaintiffs filed objections on May 4, 1992 to the Magistrate Judge's report and recommendation. Defendants Lime Street Underwriting Agencies, Ltd., Robin C. Kingsley, Robert C. Hallam, Patrick Corbett, and Bankside Underwriting Agencies, Ltd. filed a response on May 15, 1992 to the plaintiffs' objections.

Upon a magistrate judge's submission of a report and recommendation on a motion to dismiss, and the timely filing of objections by a party to the proceeding, the district court must make a *de novo* determination based upon the record and may accept, reject or modify the recommended disposition. Fed. R. Civ. P. 72(b); 28 U.S.C. § 636(b)(1)(C). The court has reviewed the report and recommendation, and finds that it accurately interpreted this court's prior opinion denying the plaintiff's request for a preliminary injunction. *Bonny v. Society of Lloyd's*, 784 F. Supp. 1350 (N.D. Ill. 1992). The report and recommendation is also well-supported by the record and the applicable law. Accordingly, the report and recommendation is adopted and the defendants' motion to dismiss the amended complaint is granted.

IT IS SO ORDERED.

ENTER:

[Charles R. Norgle]
CHARLES RONALD NORGLE, SR., Judge
United States District Court

DATED: [5/29/92]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 91 C 5525

KENNETH F. BONNY, FRANCESCA B. BONNY and ROBERT D. FLESVIG,

Plaintiffs,

—v.—

THE SOCIETY OF LLOYD'S, HARRIS BANK GLENCOE-NORTHBROOK, N.A., HARRIS TRUST AND SAVINGS BANK, BANK OF MONTREAL, NORTHFIELD VENTURE, INC., ROBERT B. KING, ALAN J. HUNKEN, LIME STREET UNDERWRITING AGENCIES LTD., ROBIN C. KINGSLEY, ROBERT C. HALLAM, PATRICK M. CORBETT, and BANKSIDE UNDERWRITING AGENCIES LTD.,

Defendants.

REPORT AND RECOMMENDATION ON DEFENDANTS' MOTIONS TO DISMISS

TO THE HONORABLE CHARLES R. NORGLE, SR., one of the Judges of the United States District Court for the Northern District of Illinois.

In its Report and Recommendation issued on September 26, 1991, this court concluded that plaintiffs had shown a likelihood of success on the merits of their claim that the forum

selection and choice of law clauses in their contractual undertakings with defendants should not be enforced. This court read the relevant decisions of the Supreme Court and the anti-waiver provision of the 1933 Securities Act to mean that if the combined effect of the parties' forum selection and choice of law clauses was to make it likely that plaintiffs would lose not only a judicial forum but their securities law cause of action, the clauses should not be enforced.

In rejecting this court's recommendation in his February 24, 1992 Order ("the Order"), Judge Norgle clearly rejected this court's interpretation of the governing law. Judge Norgle ruled that once it is determined that an agreement is "international," the anti-waiver provision of the 1933 Securities Act will not overcome the parties' freely-negotiated forum selection and choice of law clauses.

While Judge Norgle's decision establishes only that plaintiffs have not shown a *likelihood* of success on the merits and does not *necessarily* mean that their claims must be dismissed, this court views Judge Norgle's decision as dispositive for all practical purposes. The contracts at issue are clearly "international" in the sense described by Judge Norgle. This court believes that based upon that finding, Judge Norgle would uphold the forum selection clauses on this record.

This court might well reach this same conclusion applying its own interpretation of the relevant Supreme Court precedents. On a fuller examination of English law, it might conclude that an English forum would adequately allow plaintiffs the opportunity to vindicate their rights. It might conclude that plaintiffs' securities claims are barred by limitations, that the claims must be arbitrated or that the allegations of fraud are insufficient to disturb the integrity of plaintiffs' letters of credit. But pursuing any of these issues would be expensive and time-consuming for the parties. Since this court views Judge Norgle's analysis of the issues as dispositive of a controlling question of law raised by the motions to dismiss, it sees no good reason to delay the proceedings further. Based on Judge Norgle's order of February 24, 1992, therefore, it is recommended that the forum selection clauses of the parties' agreements be upheld,

and that accordingly, the Motions to Dismiss the Amended Complaint of Defendant The Society of Lloyd's and Defendants Lime Street Underwriting Agencies Ltd., Robin C. Kingsley, Robert C. Hallam, Patrick M. Corbett and Bankside Underwriting Agencies Ltd., be granted.

Counsel are given ten days from the date hereof to file objections to this Report and Recommendation with the Honorable Charles R. Norgle, Sr. Failure to object constitutes waiver of the right to appeal.

Respectfully submitted,

[Joan B. Gottschall]
JOAN B. GOTTSCHALL
United States Magistrate Judge

DATED: April [20], 1992